

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SARA E. KUHN,

Petitioner,

vs.

**PUBLIC EMPLOYMENT RELATIONS
BOARD, and STATE OF IOWA
(COMMISSION OF VETERANS
AFFAIRS)**

Respondents.

Case No. CV 6303

**RULING ON PETITION FOR
JUDICIAL REVIEW**

On November 30, 2006, this Petition for Judicial Review came before the Court for contested hearing. Attorney Rustin Davenport appeared on behalf of Petitioner Sara Kuhn. Attorney Jan Berry appeared on behalf of Respondent Public Employment Relations Board (hereinafter "PERB"). Attorney Robert Porter appeared on behalf of the State of Iowa, Commission of Veterans Affairs (hereinafter "Commission"). Following arguments by counsel, review of the court file, the certified record, and applicable law, the Court enters the following ruling.

BACKGROUND FACTS AND PROCEDURAL HISTORY

All parties agree that the facts, as found by PERB, are largely not in dispute. Therefore, the Court states the facts as found in PERB's final decision.

The Commission operates the Iowa Veterans Home (IVH), a long-term residential health care facility in Marshalltown, Iowa. Kuhn was hired by the Commission on November 24, 2000 as a Nurse Clinician. Kuhn was promoted to Nurse Supervisor on May 25, 2001. As a Nurse Supervisor she was responsible for the direct supervision of certain registered nurses, licensed

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practical nurses (LPN), approximately 30 residential treatment workers (RTW), and temporary employees in the "utility worker" classification.

During her employment at IVH, Kuhn was subject to and responsible for administration of IVH's work rules and policies, as well as policies of the State of Iowa. Kuhn completed the Applied Management Series (AMS), a program consisting of twelve seminars with the purpose of familiarizing supervisors and managers with essential personnel management concepts and applications. Among the seminars in the series were programs addressing discipline and grievances under union contracts, equal employment opportunity/affirmative action, investigating employee misconduct, and preventing sexual harassment. The stated objective of the "Investigating Employee Misconduct" seminar was to instruct the supervisors about the purpose of an investigation and the steps to be taken in the investigation process. In the sexual harassment seminar, participants were instructed to take the situation seriously and talk specifically in order to get the facts required. The sexual harassment seminar also contained sections on talking with the various parties involved in an incident. Kuhn testified that during the seminar the instructor gave "three to five days" as an indication of a timely response. Kuhn had also attended various other programs pertaining to sexual harassment claims and their investigation prior her time at IVH.

The State of Iowa and Commission's sexual harassment policy states:

Any administrator, supervisor, or employee who engages in any form of discrimination or harassment prohibited by this policy or who retaliates against an individual who has complained of discrimination or harassment will be subject to disciplinary action up to and including discharge. Also, any administrator or supervisor who fails to act upon complaints of or on personal knowledge of work place discrimination or harassment will be subject to disciplinary action up to an including discharge.

State's Ex. 1 (certified record). Kuhn also occasionally observed her direct supervisor initiate and complete disciplinary matters. Eventually, Kuhn herself became involved in the investigation of other disciplinary actions within her department. During Kuhn's time at IVH she was actively engaged in workplace committees and improvement initiatives. This activism was not always viewed positively by other management personnel and the record in this case is replete with incidents of conflict between Kuhn and management. These conflicts even included disagreements on how Kuhn handled various disciplinary investigations.

The matter which ultimately resulted in Kuhn's termination involved RTW Jamal Holmes, who was hired and began work in Kuhn's department on April 28, 2003. Prior to the incident at issue in this case, Kuhn received complaints regarding Holmes' work performance and addressed these concerns with him. In addition, after concerns regarding Holmes' performance were submitted by other staff members in writing, Kuhn observed Holmes work during a shift. She found no inappropriate or deficient performance and spoke directly to Holmes about the concerns.

Kuhn was working in her regularly assigned unit on Wednesday, August 27, 2003 when she was approached by Ashley Carkhuff, an RTW from Kuhn's unit. Carkhuff asked Kuhn if Jessica Herold, another RTW, had spoken to her yet. Kuhn stated that Herold had not and indicated that Carkhuff should have Herold come and talk to her. Kuhn's supervisor, Norman, was on a two-week vacation at that time, and was scheduled to return to work on Tuesday, September 2, 2003, the day after the Labor Day holiday. Kuhn was scheduled to work through Friday August 29, and was then set to be on vacation until Tuesday, September 9.

Carkhuff eventually approached Kuhn again and asked if Herold had talked to her yet. Kuhn responded that Herold had not and at that point Carkhuff informed Kuhn that Jamal

Holmes had exposed himself in front of Jessica. In response to this information, Kuhn told Carkhuff that she needed to hear that directly from Herold. Herold did not report to Kuhn during that shift, nor did Kuhn seek out Herold during that time. Kuhn did not work the next day. Kuhn knew another supervisor, Miller, was working during the day on Friday and would be available to Herold should she wish to report anything. Herold, however, did not speak to Miller on that Friday. On Friday August 29, Carkhuff again asked Kuhn if Herold had spoken with her. Kuhn responded in part, "How do I know the boob didn't come out first?" Carkhuff reported Kuhn's response to Herold.

On Friday (August 29) morning, Kuhn met with Director of Nursing DeJong and toured the unit with her, but mentioned nothing about Carkhuff's report. Later that day, Kuhn was called to attend to a problem with one of Holmes' patients; however, she did not discuss or inquire about the report with him either. That evening Herold came to Kuhn's office, accompanied by RTW Amanda Plaehn. Plaehn complained of Holmes' failure to perform certain resident-care functions and Herold reported that Holmes had been making inappropriate comments to her which made her uncomfortable and had intentionally exposed his penis to her in the break room. Herold was unable to specify the date of the incident, but gave Kuhn the impression that it had occurred approximately two weeks earlier. Kuhn indicated that she wished she had reported the incident earlier, but Herold stated that she was embarrassed. Herold informed Kuhn that there were no witnesses to the incident and that she did not want to repeat the comments Holmes made to her. Herold also stated that she indicated to Holmes that his conduct was unwelcome, but that he persisted and that she was avoiding him.

Kuhn then told Herold that it was up to her how she wanted to proceed with the incident. Herold perceived that Kuhn was telling her that she could pursue the complaint or wait until

something else happened. But because Herold perceived that Kuhn thought there was not enough to pursue at that point, she felt she should not pursue the complaint. Kuhn counseled Herold that she should report such things to a supervisor or nurse as soon as they happen and that she should talk to Holmes and tell him, in the presence of co-workers, that his behaviors toward her made her feel uncomfortable and unwelcome and that she would report any more inappropriate behavior.

Kuhn believed that Herold and Holmes had been involved in a break-up and made a comment during the meeting that "break-ups are hard." Kuhn also had doubts as to the veracity of Herold's report because she believed that she and other co-workers were out to get Holmes fired. Kuhn did not perceive Herold as fearful and did not seek out Holmes to question him. Kuhn also did not personally contact or inform any other supervisor after her meeting with Herold and Plaehn, even though a supervisor is available at all times.

Kuhn did author a memo to Norman and Miller dated August 29, entitled "Passing the Torch," which advised them of the current state of affairs in her department and the commencement of her vacation. Included in the memo was a notation that Holmes was

"being targeted by some of the younger female 2-10 staff. (See documentation in his file.) Jamal & Jessica Herold had feelings for each other (to the extent that it was perceived by D3 residents), but things soured and complaints commenced. I have advised Jamal to focus on his job duties and perform them well so there is nothing legitimate for anyone to complain about.

NOTE: I worked 2-10 on 8/21 and 8/27 and monitored Jamal's performance very closely—there was nothing amiss with his work on either of those two days."

Later that day, after her meeting with Herold and Plaehn, Kuhn added a line to the memo directly below the above-quoted notation, which stated: "NOW it's a different story. See my documentation of this date at 1950 hrs." The "documentation" this entry referred to was a separate one-page memo regarding Holmes which Kuhn authored following her meeting with

Herold and Plaehn. The memo discussed Holmes' leaving a resident unattended in the smoking room and what Kuhn had done about it, the report Plaehn had made about Holmes' resident-care failures that day, and Herold's report of the alleged exposure and inappropriate comments. The memo also summarized Kuhn's questioning of Herold and what she had advised Herold to do. Because her office was not secure, Kuhn placed the document in Holmes' personnel file in a locked file drawer so that it could only be accessed by other supervisors. Kuhn emailed her "passing the torch" memo to Norman and Miller and also sealed a hard copy of it in an unmarked envelope, which she placed in proximity to Norman's phone before she departed for her vacation.

Following Kuhn's meeting with Plaehn and Herold, the perception among the department staff was that nothing had been done about the situation and Plaehn planned to talk to Norman about it upon Norman's return from vacation. Norman returned to work on Tuesday, September 2, 2003. Before Norman read her email or noticed the unmarked envelope Kuhn had left, Plaehn approached Norman and reported there had been an incident where Holmes had exposed himself to Herold. When the 2-10 shift reported for work, Norman asked workers whether they were aware of the incident. A number of the staff members were aware of it and Norman asked them to document what they knew. Five staff members, including Herold, signed the resulting report detailing the incident and the report to Kuhn. Holmes was not working on September 2; nor was the supervisor normally responsible for investigations of employee misconduct. Norman met with the investigating supervisor the next morning and further investigation ensued. Supervisor Miller also received a contact from RTW Kelanie Sires regarding Holmes work performance and her knowledge about the exposure incident. Sires report was accompanied by descriptions of

other inappropriate conduct by Holmes, which was reported to Kuhn but resulted in no discipline.

Following review of the various reports by staff members and Kuhn's documentation, Norman and the investigating supervisor concluded that Holmes was a probationary employee with many performance issues, including inappropriate conduct with co-workers, and decided that termination of his employment was necessary. Holmes was then informed that he was being terminated because he had been inappropriate in his conduct with co-workers and had been talked to several times about resident care issues, with no improvement. Neither Norman nor the investigating supervisor inquired about the exposure incident, any incidents of touching, or incidents of inappropriate comments.

Norman and Miller conducted an interview with Herold later that day, which included her description of the exposure incident and her report to Kuhn. Herold also reported various incidents of comments made by Holmes in front of the residents and incidents of physical touching by Holmes. Herold denied any personal relationship with Holmes, indicated that Kuhn had the idea that they were involved, and that she had been upset that Kuhn had not taken her seriously. Herold was told that in the future she needed to report any inappropriate behavior, whether involving her or not, but was not disciplined for not reporting earlier.

The investigation continued over the next two days and began to center on Kuhn's response to the Holmes situation. The investigation consisted of interviews with several members of the department including Carkhuff and Plaehn. While none of them had witnessed the exposure incident, other staff members had altered work duties so that Herold could avoid contact with Holmes. Notes of the interviews were reviewed by DeJong prior to Kuhn's return to work on September 9. Upon her return Kuhn was taken into a meeting with DeJong and

Norman, where she was told that an investigation was being conducted into her response to the exposure report. Kuhn indicated that she had handled the matter appropriately, although acknowledging that she had not commenced an investigation when Carkhuff told her of the alleged exposure incident. Kuhn explained that she had heard that a relationship between Holmes and Herold had gone sour and that she did not know if Herold had anything to cause the incident, that Herold had been uncomfortable and embarrassed and did not want to pursue the matter, and that she didn't feel she could push Herold to do so. Kuhn further acknowledged that she had not contacted any other supervisor about the incident, but stated that she left a memo for Norman and Miller. Kuhn also expressed doubt about the veracity of Herold's report because of the perceived effort of the staff to get Holmes fired and Kuhn's perception that Herold lacked sincerity because she resisted reporting even though her coworkers pressed her to report the incident. Kuhn also admitted that she had not done anything to assure that Herold would not have to work with Holmes and that she did not perceive Holmes' continued employment to be a high-risk situation. At the conclusion of the interview, Kuhn was suspended with pay pending management's consideration of the results of the investigation.

On September 15, 2003, Kuhn reported to the IVH nursing office and met with DeJong and Norman. DeJong informed Kuhn that management found that she had not performed appropriately as a supervisor when she failed to follow up the alleged exposure incident as contemplated by the policy prohibiting sexual harassment. DeJong indicated that Kuhn would be discharged unless she could present reasons why she should not be discharged. Kuhn expressed her view that her actions were justified under the entirety of circumstances. Kuhn's argument, however, was insufficient to alter the termination decision.

Kuhn's employment was terminated for her failure to appropriately respond to reports of "an illegal act involving sexual harassment," which had allegedly been committed at IVH by an employee under her supervision. Kuhn filed a grievance challenging the State's decision to terminate her employment pursuant to the "non-contract" employees' grievance procedure, alleging just cause did not exist. The parties were unable to resolve the dispute during the initial three steps of the grievance procedure. In response to her grievance being denied, Kuhn filed a disciplinary appeal. The presiding officer issued a Proposed Decision on May 5, 2006. The matter was then appealed. PERB issued a decision on July 14, 2006 finding that the Respondents had established just cause sufficient to support termination and dismissed Petitioner's appeal. Kuhn timely filed this Petition for Judicial Review.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. Section 17A.19 authorizes the district court to review such decisions. The court shall reverse, modify or grant other appropriate relief from agency action if such action if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action was improper under any of the enumerated reasons. IOWA CODE § 17A.19(10) (2005).

In this case it is alleged that PERB's decision was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when the record is viewed as a whole. *Id.* § 17A.19(10)(f). Substantial evidence means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious

and of great importance. *Id.* § 17A.19(10)(f)(1). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. *Id.* § 17A.19(10)(f)(3). Ultimately, "substantial evidence" under this standard is what a reasonable mind would accept as adequate to reach a given conclusion, even if the reviewing court would have drawn a contrary inference from the evidence. *Cargill, Inc. v. Conley*, 620 N.W.2d 496, 500 (Iowa 2000). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Missman v. Iowa Dep't of Transp.*, 653 N.W.2d 363, 367 (Iowa 2002).

Petitioners also allege that PERB's decision was based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency or that the decision is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. IOWA CODE § 17A.19(10)(m), (n). The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. IOWA CODE § 17A.19(8)(a). The court shall make a separate and distinct ruling on each material issue on which the court's decision is based. *Id.* § 17A.19(9).

ANALYSIS AND CONCLUSIONS OF LAW

The first ground for relief alleged by Petitioner is a claim under Iowa Code section 17A.19(10)(f), which permits relief if the agency's decision was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when the record is viewed as a whole. *Id.* §

17A.19(10)(f). Based on the Court's thorough review of the voluminous record in this case and the admission by all parties that the facts, as found by PERB, are largely undisputed, the Court concludes that PERB's determinations of fact are supported by substantial evidence in the record and the petition for judicial review is denied on this ground. The remaining arguments of the Petitioner amount to whether PERB's decision was based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency or that the decision is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Interpretation and application of Iowa Code section 8A.415(2) has been vested in the discretion of PERB. The code section provides that PERB shall conduct hearings on the employee disciplinary action appeals in accordance with chapter 17A, and if it finds that disciplinary action was imposed for reasons not constituting "just cause," it may provide for appropriate remedies, including reinstatement of employees without loss of pay or benefits. *See* IOWA CODE § 8A.415(2).

The term "just cause," as employed in Iowa Code section 8A.415(2) and administrative rules, is not defined by statute or rule. PERB has taken the approach that a "just cause" determination requires an analysis of all the relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend on a mechanical, inflexible application of fixed "elements" which may or may not have any real applicability to the cause under consideration." *PERB Decision*, p. 42 (citing *Hunsaker and State of Iowa (DES)*, 90-MA-13, at 40 (PERB 1991)). Specific factors that may be relevant to determining just cause include:

Whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof

of the employee's guilt of the offense is established; whether progressive discipline was followed, or is not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there were other mitigating circumstances which would justify a lesser penalty.

The Board has also recognized that the treatment accorded other, similarly situated employees may be relevant.

Hoffman and State of Iowa, 93-MA-21 (PERB 1993); *see also Lang and State of Iowa*, 87-MA-09 (PERB 1998). The types of actions which a disciplinary action may be based on, however, include:

inefficiency, insubordination, less than competent job performance, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance or the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.

Iowa Admin. Code r. 11-60.2. Kuhn's disciplinary action falls under the categories of less than competent job performance and failure to perform assigned duties. It is Respondents' position that Kuhn, as a supervisor, was given the responsibility to ensure the sexual harassment policies were adhered to and to investigate alleged violations. *See State's Ex. 1* (certified record).

Clearly, exposing one's genitals to a coworker in the workplace constitutes sexual harassment within the meaning of the State's policy. The report of the exposure incident took the ongoing complaints about Holmes to a different level than they were when they were limited to work performance. The alleged conduct was a report of serious and offensive workplace misconduct. It is not incorrect to conclude that a reasonable supervisor, operating under a reasonable understanding and interpretation of the State's policies, would have immediately sought out Herold or definitively arranged to talk with her as soon as possible, in order to confirm or rebut Carkhuff's report and ascertain the details of the alleged incident. In the

alternative, a reasonable supervisor would have notified others in the supervisory chain so that they could pursue an inquiry. Under the facts of this case, Kuhn did neither, despite the fact that on the morning of August 29 she met with and toured the department with DeJong, without so much as mentioning the exposure incident. Moreover, Kuhn did not initiate an investigation following Herold's personal report of the incident to her. While she memorialized her knowledge of the accusation in the memo she placed in Holmes' file in the locked file cabinet, the indirect notation she added to her "passing the torch" memo did nothing to convey to Norman or Miller the seriousness of the allegation she received. Even though it was Friday before a holiday weekend when Herold reported the incident, Kuhn knew that there was an on-call supervisor available by pager. Under this set of facts, it is clearly reasonable for PERB to have decided that her response and reporting to others was insufficient.

The Court also agrees with PERB's assessment that Kuhn's claim that she did begin an investigation was at odds with her later justifications for a failure for an investigation to take place. In particular, Kuhn asserted that Carkhuff was not a reliable source of information and that Herold's personal report of August 29 had not been established to Kuhn's satisfaction. As indicated by PERB, such assertions demonstrate Kuhn's failure to grasp what an investigation is and why one is conducted, and confuses evidence-gathering with the evaluation of the evidence gathered. Kuhn was not the ultimate fact-finder, yet she came to draw conclusions about motivation and credibility. Kuhn's approach minimized the seriousness of the allegations and her comments to Carkhuff regarding possible provocation of the exposure is further evidence of Kuhn's improper handling of the situation. PERB was fully justified in its determination that any reasonable view of the facts of August 27 and 29 could not lead one to the conclusion that Kuhn's actions constituted the initiation of an investigation into the alleged exposure incident.

Kuhn also attempts to argue that she was unaware of what was expected of her in this type of situation. Based on the record, this argument carries little weight. Kuhn had specific training pertaining to sexual harassment claims and how they were to be handled. In addition, Kuhn, in a separate argument, sets forth prior investigations at IVH as indicative of what process should have been undertaken. With both specific training and prior illustrative examples, Kuhn was fully aware of what was required of her as a supervisor.

In the alternative, Kuhn attempts to place her actions in a positive light by claiming that they were consistent with the AMS training she received and the authoritative resources available to her. However, the standards cited by Kuhn were not even followed in this case and other purported standards, such as a five-day deadline are not supported by the resources. Even were such a rule to exist, PERB determined Kuhn's actions would only have allowed an investigation to be properly initiated after six days.

Finally, Kuhn's emphasis on the fact that she repeatedly asked Herold whether she wanted to pursue her complaint is direct contradiction to her training on investigating sexual harassment complaints. All of her prior training directed that sexual harassment complaints should be investigated, regardless of the victimized employee's wishes.

Based on these determinations, PERB concluded that Kuhn's actions amounted to a failure to act on complaints of workplace harassment within the meaning of the sexual harassment provisions of the State's EEO/AA/Anti-discrimination policy. See State's Ex. 1.

The policy states:

[A]ny administrator or supervisor who fails to act upon complaints of or on personal knowledge of work place discrimination or harassment will be subject to disciplinary action up to and including discharge.

This policy not only lays out what is required of supervisors in Kuhn's position, but also specifies what level of discipline may be imposed. PERB's determination that Kuhn's short conversations with Herold and imprecise and vague written documentation prior to her leave from work were insufficient to have discharged her duty as a supervisor are a completely reasonable and fully supported position.

Looking back to the various factors that may be used in making a just cause determination, the Court concludes that PERB's decision should be upheld under the judicial review standards of Iowa Code section 17A.19. Kuhn had knowledge of the IVH's rules and expected conduct. There is no basis to conclude that sufficient and fair investigation was not conducted by IVH in this case. Likewise, the reasons for the discipline were adequately communicated to Kuhn. The Court has already spoken on whether sufficient evidence or proof of Kuhn's guilt of the offense was established. While progressive discipline may not have been followed, the policy that Kuhn violated contemplated termination as a potential outcome. Based on its extensive recitation in PERB's ruling, the Court is convinced that proper consideration was given to Kuhn's employment record, including her years of service, performance, and disciplinary record. Finally, PERB thoroughly addressed the various mitigating circumstances raised by Kuhn, which might justify a lesser penalty.

A final argument made by Kuhn claims that IVH administration no longer wanted her there and seized upon this incident as an opportunity to terminate her unjustifiably. Much like PERB, the Court is aware that there was prior conflict between Kuhn and others in IVH management. Nevertheless, Kuhn's conduct in this case after being notified of the exposure allegations clearly justifies management's conclusion that her lack of judgment rendered her continued employment as a supervisor inappropriate. Moreover, her continued stance that she

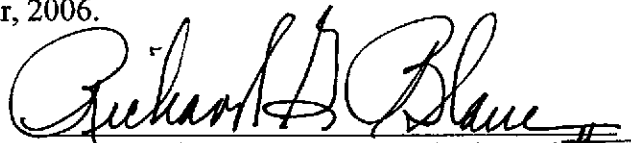
would conduct herself in the same way if presented with that situation again can be viewed as supporting management's conclusion. Ultimately, while a lesser level of discipline might have been used in this case, Kuhn's actions do constitute just cause for the termination of her employment at IVH.

Returning to the standards for judicial review, the Court is unable to locate any provision of law that was interpreted irrationally, illogically, or unjustifiably, and which served as a basis for PERB's decision in this case. Additionally, it was a reasonable exercise of the agency's discretion and not arbitrary, capricious, or an abuse of discretion to determine that Kuhn's conduct amounted to just cause for termination. Having reviewed all of the issues presented in this case under the parameters of Iowa Code section 17A.19, the Court concludes that PERB's decision be affirmed.

ORDER

IT IS THE ORDER OF THE COURT that the decision of the Iowa Public Employment Relations Board is **AFFIRMED**. Costs are assessed to the Petitioner.

SO ORDERED this th13 day of December, 2006.


RICHARD G. BLANE, II, District Judge
Fifth Judicial District of Iowa

Clerk: J C U X

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